IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 741 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

AKBAR ALBHA BAJI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 741 of 1994

MR MAHBOOB M SHAIKH for Petitioner No. 1-3

MR IM PANDYA, APP for Respondent No. 1

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 21/03/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE AKSHAY H.MEHTA)

1. The appellants are original accused nos. 3, 7 and 8 of Sessions Case No. 59 of 1991 of the Sessions Court at Bharuch and they have preferred this appeal for challenging their respective convictions u/Ss. 326, 324 and 302 of the Indian Penal Code (for short 'IPC'). By judgment and order dated 10th June, 1994 appellant no. 1 has been convicted for committing offence u/S. 326 of the IPC and he has been sentenced to suffer RI for three years and to pay fine of Rs.2,000/-, in default RI for six months, appellant no. 2 has been convicted for committing offence u/S. 324 of the IPC and he has been sentenced to suffer RI for one year and to pay fine of Rs.1,000/-, in default RI for three months and appellant no. 3 has been convicted for committing offence u/S. 302 of the IPC and he has been sentenced to suffer RI for life and to pay fine of Rs.3,000/-, in default RI for one year.

1.1. During the pendency of the appeal, appellant no. 2 Rahim Rasul Kesar Bhatti has expired as can be noticed from the endorsement made by the office of this Court on the basis of endorsement made by the Ld. Addl. Sessions Judge, Bharuch, dated September 19, 1998. As per the provisions of section 394, sub-section (2) proviso of the Code of Criminal Procedure, a near relative of the deceased appellant could have filed an application to continue the appeal since the appellant had died during pendency of the appeal. No such application has been filed by the near relative of deceased appellant no. 2. Hence, appeal of appellant no. 2 original accused no. 7 - Rahim Rasul Kesar Bhatti finally abates and we are now required to deal with appeal in respect of appellant no. 1 and appellant no. 3 only.

2. The facts giving rise of the present prosecution can be stated in brief as follows :-

2.1. The incident in question took place in a village known as Vasti Khandali in the district of Bharuch on 6th April, 1990 at about 7.00 p.m. One Ismail Yusuf Amiji, resident of village Vasti Khandali was administering the affairs of a newly constructed Masjid at the time when the incident took place. On 6th April, 1990 Ismail Yusuf Amiji, who is also complainant of this case, at about 5.00 p.m. had gone to the Masjid for offering prayers. At that time appellant no. 3 and some other persons were present there and they were criticizing the administration of the Masjid by the complainant. The complainant did not pay any attention to that and he went home. Two hours thereafter i.e. at

about 7.0 p.m. the complainant and others had gone to the Masjid for offering prayers. At that time present appellants alongwith other original accused came there armed with deadly weapons. When the complainant came out of the Masjid after offering prayers for going home, the appellants and other accused started abusing him. They thereafter mounted the attack on the complainant and other persons who were at that time with him. During the attack several persons on the side of the complainant received injuries on different parts of their bodies. Hearing the commotion the mother of the complainant, aged lady named Amnaben, came there and requested the appellants and other accused not to beat the complainant and others. Appellant no. 3 gave a severe blow on the head of the lady with a stick. As a result of that, Amnaben fell down on the ground. She was thereafter attacked by original accused Mohmed Musa, who gave blows on her back with stick. Appellant no. 1 was having Dhariya with him and he caused injury to the brother-in-law of the complainant, namely Ismail Patel by means of Dhariya and caused him injuries on the head as well as on the leg. In the meanwhile, Sarpanch of the village Ismail Umar Baji alongwith Yakub Ismail Dadabhai and some leaders of the village came there and he shouted at the accused to stop the attack. The accused, therefore, started going towards their home. However, while proceeding towards their residence, they even pelted stones and brick bats which caused injuries to several other persons.

2.2. The injured persons were brought to Wagra Primary Health Centre, but since no Medical Officer was present there, they were taken to Bharuch for medical treatment. So far Amnaben is concerned, from Bharuch she was taken to Baroda for treatment, but before she could reach the hospital at Baroda, she expired on the way.

2.3. On the same day, Ismail Yusuf Amiji went to the Wagra Police Station and filed his complaint. It was registered as C.R. No. I - 36 of 1990 at the said police station against the present appellants and other original accused in respect of offences u/Ss. 143, 147, 148, 149, 307, 302, 323, 337, 324, 426 read with sec. 504 of the IPC and for offence u/S. 135 of the Bombay Police Act. After registering the offence, the police commenced usual investigation and in the course of the said investigation the accused were arrested, statements of various witnesses were recorded, panchnamas were drawn and the injured persons' medical record was obtained and so also the post mortem notes of deceased Amnaben. After completing the investigation, the police filed the

charge-sheet against the present appellants and other original accused for aforesaid offences in the Court of the concerned Ld. Magistrate, who in turn committed the case to the Court of Sessions as the offences u/Ss. 302 and 307 are exclusively triable by the Court of Sessions.

3. At the trial the Ld. Addl. Sessions Judge, Bharuch framed charge against all the 12 accused at Exh. 2 on 24th August, 1993. They, however, pleaded not guilty to the said charge and claimed to be tried.

3.1. The prosecution, in support of its case, has examined witnesses and has also placed reliance on the documentary evidence. On completion of the recording of the oral evidence further statements of all the accused (the appellants) were recorded u/S. 313 of the Code of Criminal Procedure. No specific defence has been taken by them and their defence appears to be that of general denial.

4. The Ld. trial Judge, at the end of the trial, found that though there were 12 accused in the case, there was no offence of unlawful assembly committed and the prosecution had failed to prove the same. He, therefore, convicted the appellants for their respective individual acts, but acquitted all the other accused of the offences with which they were charged. The appellants, as stated above, have, therefore, approached this Court challenging the orders of conviction and sentence passed individually against them.

5. With a view to reappreciate the evidence, we have gone through the entire record of the case and we have also carefully considered the submissions advanced by the learned advocates for both the sides, namely the appellants as well as the respondent - State.

6. Firstly it will be desirable to decide whether the deceased Amnaben died homicidal death. Dr. Rashmikant Chimanlal Mehta, P.W. 5 Exh. 25 is the Medical Officer, who has performed the autopsy of the deceased Amnaben. In his evidence he has stated that on 8th April, 1990 while he was in the hospital as Medical Officer, the dead body of Amnaben Yusuf Umarji was brought to the hospital. According to him, on examination, it was found that the deceased had sustained a vertical wound of 5 cm. length on fronto parietal region (stitched wound) soft swelling around the injury is present. He has further stated that injury was caused by hard and blunt substance like a stick and the injury was ante-mortem. He has further stated that the death was caused due to damage caused to the brain on account

of internal haemorrhage. He has further stated that the injury was sufficient to cause death. In the cross-examination by the defence he has stated that it was not possible to say whether the injury was serious or simple by its outer appearance. He has further stated that from the fact that fracture was caused, he could say that the blow was given with force. He has further stated that if the brain of the patient was treated immediately, there was possibility of her survival. He has further stated that the injury was sufficient to cause death. But immediately thereafter he has stated that there was possibility of death being caused due to this injury. He has produced the post mortem examination notes of the deceased Amnaben at Exh. 26. In column No. 17 of the notes the aforesaid injury has been described. So far the corresponding internal injuries are concerned, they are indicated in column no. 19 which show that there was hematoma below the scalp and there was linear crack H of frontal bone extending to parietal bone in mid line. So far the brain is concerned, it is noted that there was subdural & subarachnoid hematoma present on both front parietal hemisphere and the brain was pressed in the hematoma in front region. In column no. 23 he has given his opinion and it is stated that in his opinion the cause of death was shock due to intracranial haemorrhage causing brain damage.

6.1. Dr. Vinaychandra Lallubhai Patel P.W. 14 Exh. 44 is Medical Officer, who at the relevant time, was attached to Civil Hospital at Bharuch. He has stated that on 6/4/1990 he was at the hospital from 8.00 a.m. to 8.00 p.m. and during that period Amnabibi was brought to him in injured condition. He has stated that she had suffered following injuries :-

i. she was semi-conscious
ii. There was a contused lacerated wound on the main fronto parietal region of the size of 5 x 1.1/2 cm. bone deep.

He has further stated that she was admitted as indoor patient and on 7/4/1990 she was forwarded to S.S.G. Hospital at Baroda for further treatment. He has also stated that in his opinion, the injury was caused by hard and blunt substance and the injury was serious and it was sufficient to cause death. In the cross-examination by the defence he has stated that Amnaben had not sustained any fracture. He has also stated that in some cases if there is an injury on the head and there is no fracture, the injury could be termed as simple injury. He has further stated that if a patient has received such

injury, the chances of survival are there.

6.2. Considering the medical evidence on record of the case, it clearly appears that the death was caused due to the injury suffered by the deceased Amnaben on her head causing damage to her brain. In that view of the matter, coupled with the oral evidence of eye witnesses, which will be shortly discussed, there is no difficulty for us to hold that the death was a homicidal death and on that count we are in agreement with the conclusion reached by the trial Court.

7. The next question that would arise for our consideration is whether the prosecution has been able to bring home the charges levelled against the appellants and whether the order of conviction recorded by the trial Court for the respective offences alleged to have been committed by appellant nos. 1 to 3 is proper.

7.1. As stated above, the prosecution has examined several witnesses and some of them are eye witnesses who have received injuries in the present incident. P.W. 1 Ismail Yusuf Amiji Exh. 20 is the complainant of this case. He is an injured eye witness. In the examination-in-chief he has stated that the present incident had taken place about 3 and 1/2 years prior to the date of his deposition in the Court. He has stated that there is a Masjid in the village and on the date of incident he had gone to the Masjid for offering prayers at about 5.15 p.m. At that time the accused were present and they had started quarreling with him. They told him that his administration of the Masjid was not proper. He has further stated that since it was a month of Ramzan and he was observing fast, he had gone away quietly to his home. He has also stated that at about 6.55 p.m. it was time to release the fast and for that purpose he had gone to Masjid for offering prayer. While he was returning home, the accused who were armed with weapons, followed him and they started giving filthy abuses to him. He has also stated that at that time original accused no. 5 was having Dhariya, accused no. 3 i.e. present appellant no. 1 was having Dhariya, accused no. 7 i.e. deceased appellant was having spear, accused no. 8 i.e. present appellant no. 3 was having a stick and so were accused nos. 6, 4 and 1 and also 9. Immediately after the altercation original accused no. 1 - Ayub Rahim gave him a blow with stick on his hand which had caused him injury on the finger of left hand. He also caused injury on the back of Yusuf Ibrahim with stick. Original accused no. 5 caused injury on the head of Mohmedali Asmal by means of a Dhariya, which had

caused bleeding. Accused no. 4 had given blows with stick to Abdul Ahmed Amiji on his back and on the head. Again accused no. 1 gave blow with stick on the head of Vali Umarji. Accused no. 7 i.e. the deceased appellant had caused injury to Ismail Dadu Kaju on thigh by means of spear and present appellant no. 1 i.e.accused no. 3 had caused injury with Dhariya on the head of Ismail Mohmed. He also gave another blow with Dhariya to Ismail Mohmed on his right leg. According to the witness, this Ismail Mohmed was his brother-in-law. He has further stated that while the attack was going on, his mother Amnaben came there and she started asking the assailants what they were doing. The witness has further stated that while Amnaben was speaking, accused no. 8 i.e. present appellant no. 3 gave a blow with stick with force on her head, as a result of that she fell down on the ground. Thereafter accused no. 6 gave on her back and hand blows with stick. He has further stated that again accused no. 8 i.e. present appellant no. 3 gave a blow with stick on the shoulder of Mohmed Hasan and accused no. 9 Bashir Rahim gave blows with stick on the back and hand of Musa Umar. Musa Karim i.e. accused no. 10 caused injury to Maksud Abdul on his head with a brick and accused no. 2 Rahim Hasan caused injury to Makbul Hussain on his left elbow with stick. This witness has further stated that in the meanwhile Sarpanch of the village Ismail Umar alongwith Yakub Ismail Dadabhai and others came there and they shouted at the accused why they were beating the complainant and others and rendering them in bleeding condition. The accused, therefore, started going away from the scene of offence. While they were going away, they threw brick bats on the houses of Vali Umarji and Abdul Ahmed Ameji and also at the house of Hafiji Ahmed Musa, which caused injuries to Ismail, Shakina and others. He has further stated that the injured were taken initially at Wagra Primary Health Centre, but since there was no Medical Officer present, they were taken to Bharuch Civil Hospital in the ambulance of the Primary Health Centre. He thereafter approached the police and lodged his complaint. He has further stated that condition of his mother was very serious when she was admitted in Bharuch Hospital and under the medical advice she was being taken to Baroda when she died on the way. He has stated that since he was the trustee of the Masjid and the accused did not like it, they have picked up this quarrel. In the cross-examination some efforts have been made by the defence to dislodge it by putting to him number of questions on the incident itself. However, on going through the same it clearly appears that the defence has not been able to elicit anything which could be of any

help to it. This witness has ably withstood his cross-examination and there is nothing in his evidence which can persuade us not to accept it. He has rightly denied the suggestion of the defence that it was not true that when somebody was being attacked, his mother tried to intervene physically and in the process she had received injury.

7.2. The complaint given by him is produced on record at Exh. 21.

7.3. The evidence of P.W. 2 Ismail Mohmad Patel at Exh. 22 is also of much relevance so far the present appeal is concerned. According to the prosecution appellant no. 1 had caused him injuries with Dhariya on his head as well as on the leg. In the examination-in-chief he has stated that on the day of incident he was at home and on hearing the commotion he went to Haveliwala Falia near the house of the complainant. At that time present appellant no. 1 Akbar Abhla gave him a blow with Dhariya on the head and second blow on his leg. He has also stated that at that time his mother-in-law Amnaben came there and she told the accused why they were beating. Immediately thereupon accused no. 8 i.e. appellant no. 3 gave a blow with force by means of a stick on the head of Amnaben. In the meanwhile Sarpanch Ismail Umar came there and at his persuasion the accused went away. In the cross-examination he has been confronted with his police statement, but he has stated that in his police statement he had stated that when he was being beaten his mother-in-law had come there. He has denied the suggestion made by the defence that when Akbar Ismail Dadu received injury, Amnaben had tried to intervene. He has further stated that after the assault on him, he had not lost his consciousness and he was conscious even at the time of recording of his statement by the police in the hospital.

7.4. The prosecution has thereafter relied on evidence of P.W. 3 Yakub Ismail Darawala Exh. 23 and P.W.4 Ismail Umar Bapu Exh. 24, who at the relevant time was Sarpanch of village Vasti Khandali. Their evidence lend support to the evidence of P.Ws. 1 and 2. He has also stated about the assault on Amnaben by appellant no. 3.

7.5. P.W. 3 has also spoken about the assault on the deceased by appellant no. 3. Further the prosecution has examined eye witnesses who have by and large supported the evidence adduced by the prosecution

and from their evidence also ample corroboration is received to the version of the incident given by P.Ws. 1 and 2. Since it will be mere repetition of what has been confronted and P.Ws. have said in their evidence, the evidence of other witness is not being discussed in detail. So far the injured witnesses are concerned, except injuries caused to P.W. 2 and the deceased, the trial Court has not believed the story of the prosecution in respect of other accused and for that reason the trial Court has not believed the evidence of such prosecution witnesses. Moreover, upon their acquittal the State has also not preferred any appeal challenging their acquittal. In that view of the mater, it is not necessary for us to refer the evidence of such witnesses vis-a-vis the accused who have already been acquitted. Similarly since appellant no. 2 has expired and appeal qua him is abated, it will be mere exercise in futility to consider prosecution's evidence in respect of him the deceased appellant. Therefore, we are simply concentrating the evidence which is relevant for the purpose of deciding the guilt or otherwise of appellants nos. 1 and 3. It may also be stated here that the trial Court has not accepted the case of the prosecution of unlawful assembly formed by the accused at the time of incident and they have been acquitted of the charges levelled against them u/Ss. 147, 148 and 149 of the IPC. The present appellants have been convicted simply on their individual acts and for that purpose also we are taking into consideration only such evidence which may enable us to reach to a proper conclusion in respect of appellants nos. 1 and 3.

7.6. As stated above, so far appellant no. 1 is concerned, he is alleged to have caused injuries by means of Dhariya on the head and leg of P.W. 2 - Ismail Ahmed Patel. This fact is stated by P.W. 1 as well as by injured himself. Further more this piece of evidence receives ample corroboration from the medical evidence. As appears from the record, on receiving the injury Ismail Mohmed Patel was admitted in Civil Hospital at Bharuch and he was examined and treated by Dr. Vinaychandra Lallubhai Patel Exh. 44. He has stated in his evidence that on 6th April, 1990 while he was working as Medical Officer at Civil Hospital, Bharuch, at about 9.20 p.m. he had examined Ismail Mohmed, who had received following injuries :-

i. Incised wound 1 cm x 1/2 cm size muscle deep surrounded by diffuse tender swelling on occipital region of scalp

ii. Incised wound 1 cm x 1/2 cm size muscle deep

surrounded by Diffuse tender swelling on upper 1/3rd part of right leg.

He has further stated that upon X-ray being taken, it was found that this witness had sustained fracture of right fibia and he was admitted in the hospital on 6/4/1990 and discharged on 26/4/1990. In his opinion such injury could be caused by a Dhariya. He has further stated that the injury was a grievous injury.

7.7. This witness has also produced the medical certificate in respect of Ismail Mohmed Patel which is taken on record at Exh. 54. The evidence of Dr. Vinaychandra Patel as well as the contents of the medical certificate at Exh. 54 amply corroborate the version of the incident given by P.W. 1 and P.W. 2. So far P.W. 2 is concerned, he himself is injured. It is very easy for him to identify the assailants and also for safe or sure by what means the injuries were caused to him. According to him, appellant no. 1 had caused injuries to him by means of Dhariya. This receives adequate support from the medical evidence which clearly shows that the injuries were caused by sharp cutting instrument like Dhariya and further the medical evidence clearly shows that he had sustained fracture and he was required to remain in the hospital for 20 days. Therefore, we have no hesitation to hold that this witness had suffered grievous hurt. Now from the evidence of this witness coupled with evidence of P.W. 1 and evidence of other eye witnesses, it becomes very clear that it was appellant no. 1 who had caused these injuries to him. There is no reason whatsoever for P.Ws. 1 and 2 to falsely involve the appellant no. 1. In light thereof, we are also satisfied that the prosecution evidence clearly establishes the fact that it was the appellant no. 1 who had caused this injury to P.W. 2, namely Ismail Ahmad Patel.

7.8. There is no doubt in our mind that since the injuries to the victim have been by means of Dhariya and the injuries are of grievous nature, the offence would fall u/S. 326 of the IPC as Dhariya being a dangerous weapon. We have, therefore, no difficulty in reaching to the conclusion that the appellant no. 1 is guilty of committing an offence made punishable u/S. 326 of the IPC and the finding on that count of the trial Court is absolutely just and proper and requires no interference at our hands.

8. This brings us to the question of considering what offence appellant no. 3 has committed.

If the case of the prosecution is that at the time of incident appellant no. 3, who is original accused no. 8, was armed with stick and while the attack was going on deceased Amnaben came there and she asked the assailants not to beat the complainant and others and at that time appellant no. 3 struck a blow with stick with force on the head of Amnaben, as a result of which she sustained serious injuries. It is further the case of the prosecution that Amnaben was secured medical treatment at Bharuch Civil Hospital, but while she was being taken to Baroda for further treatment, she died on the way on account of the injuries sustained by her. We have already come to the conclusion that so far the death of Amnaben is concerned, it is a homicidal death. Further we have also narrated and discussed the evidence of eye witnesses, namely Ismail Yusuf Amiji P.W.1 Exh. 20, Ismail Ahmad Patel P.W. 2 Exh. 22, Ismail Umar, the Sarpanch, etc. and they have all supported the case of the prosecution by stating that it was appellant no. 8 who had caused this injury to Amnaben. We have, therefore, no reason to doubt their version and we, therefore, hold that it is appellant no. 3 who is the author of the injury caused to Amnaben.

8.1. The vital question therefore, remains for us to be decided is what offence the appellant no. 3 has committed. According to Mr. M.M. Shaikh, learned advocate appearing for Mr. Bukhari for the appellants has submitted that it is a case of single blow and considering the fact that Amnaben had tried to intervene when the attack on the members of the side of the complainant was going on, she had received this injury and therefore, there was no intention on the part of appellant no. 3 to cause death of Amnaben. He has further submitted that looking to the medical evidence on record, also it does not appear that appellant no. 3 had any intention to cause death of the deceased. Further he has submitted that looking to the facts of this case and the circumstances in which the injury came to be caused to the deceased, at best it could be said that appellant no. 3 had knowledge that if such injury is caused, it might result into death of Amnaben and that would take his case u/S. 304 Part-II. But in any case appellant no. 3 cannot be held liable for committing an offence u/S. 302 of the IPC. In support of his contention, he has placed reliance on several decisions of the Apex Court.

8.2. As against that, Mr. I.M. Pandya, Ld. APP appearing for the respondent - State has submitted that the appellant and other original accused had come to

the scene of offence duly armed with deadly weapons and immediately without any rime or reason they have mounted assault on the complainant and others. Further he has submitted that when Amnaben came there and when she was requesting the accused not to beat the complainant and others, appellant no. 3 had delivered a stick blow with force on her head which ultimately caused her death. He has, therefore, submitted that looking to the fact that a deadly weapon like stick has been used for committing the injury, the injury has been caused on the vital part of the body, namely the head and the force with which the blow has been delivered show that appellant no. 3 had only one intention and that to cause the death of the deceased. He has submitted that in these circumstances so far the appellant no. 3 is concerned, his case squarely stands covered under the provisions of section 300 which is made punishable u/S. 302 of the IPC. On going through the evidence and in particular the medical evidence in the form of the deposition of Dr. Mehta and Dr. Patel together with the post mortem report, we find that in deciding this question it will render much help to us. As already discussed above, Dr. Rashmikant Mehta P.W. 5, who has performed the post mortem examination of the deceased, has stated that the injury received by the deceased was sufficient to cause her death. So far evidence of Dr. Vinaychandra Patel is concerned, he has also stated that the injury caused to the deceased was sufficient to cause her death. However, both these witnesses are completely silent on the aspect whether the injury was sufficient in ordinary course of nature to cause death. The requirement of clause 3 to section 300 is in case of offence of murder, the injury caused to the deceased should be sufficient in ordinary course of nature to cause death. In the section as has been held by the Apex Court in respect of this clause, the emphasis is laid on the words "sufficient in ordinary course of nature". These words are not to be found in the evidence of both these witnesses. Not only that but so far Dr. Mehta is concerned, he has stated that if the patient had received immediate treatment, there were chances of her survival. He has further stated that due to this injury, there was a possibility of death being caused. If we refer to the evidence of Dr. Vinaychandra Patel he has stated that there was no fracture of the bone of Amnaben. He has further stated that if a patient has received such injury, there was possibility of his or her survival. In light of this evidence, we are of the opinion that the prosecution has failed to prove that the injury suffered by deceased Amnaben was sufficient in ordinary course of nature to cause death. At best it can be said that that injury was likely to cause her death. In view of that,

the case of the appellant no. 3 does not fall within the mischief of clause 3 of section 300 of the IPC. So far the intention part is concerned, it is also very difficult to hold that the said appellant had an intention to cause death of Amnaben. It may be worthwhile to note here that according to the prosecution, many of the 12 accused were armed with deadly weapons and many members on the side of the complainant had received injuries. However, the record and in particular the medical certificates in respect of these injuries show that the injuries were not serious and in most of the cases there were simple injuries. If the intention on the part of the accused was to carry out murderous assault on the complainant and his friends, the injuries suffered by them would have been of much serious nature and not such trivial injuries. Therefore, there is all possibility and scope to infer that the accused had armed themselves only with the intention to belabour the complainant and others and not to cause death of anybody. It is unfortunate that while tampers were running high, the deceased came there and blow was given on her head by appellant no. 3. However, this fact alone would not persuade us to hold that he had intention to cause her death. The fact remains that so far the deceased is concerned, she had nothing to do with the dispute which existed between the accused and the complainant. In other words, there is no animosity between appellant no. 3 and the deceased. It was a sheer misfortune of the deceased that she tried to persuade the accused at a wrong time and the blow was delivered on her head. We are fortified in taking this view by the view taken by the Apex Court in similar set of facts in the case of K. Ramakrishnan Unnithan v. State of Kerala reported in AIR 1999 S.C. page 1428. In that case the Apex Court has held as under:-

> "....It is however crystal clear that the appellant had no animosity against the deceased and he was involved because of the altercations with PW-1. The scenario in which the appellant has been stated by the eye-witnesses to have given one blow on the deceased, it is difficult for us to hold that he gave the blow in question either with the intention of causing murder of the deceased or he can have said to have the requisite knowledge that the death would otherwise be the inevitable result. In such a situation, even on accepting the prosecution case we hold that the accused did not commit the offence under Section 302 but under Part II of Section 304, IPC. We accordingly, set aside the

> conviction of the appellant under Section 302, IPC and instead convict him under Section 304, Part II. ... "

Similarly in the present case it would be not possible to infer that appellant no. 3 had entertained an intention to cause death or to cause such bodily injury to the deceased which was sufficient in ordinary course of nature to cause death. As stated above, at best it can be held that he had knowledge that if such injury is caused, it may result into death of the other person. His case, therefore, does not fall u/S. 300 and the offence which is alleged to have been committed cannot be u/S. 302, but it would fall u/S. 304 Part-II of the IPC. The conclusion reached by the trial Court on this count is, therefore, erroneous and it deserves to be quashed. We intend to hold that appellant no. 3 has committed an offence which is made punishable u/S. 304 Part-II of the IPC.

9. The question that now remains to be considered is what sentence to be awarded to appellants nos. 1 and 3. So far appellant no. 1 is concerned, we have held him guilty for committing offence u/S. 326 of the IPC. From the record and proceedings of the case it appears that he has remained in custody at pre-trial stage for 15 days. Thereafter he was bailed out and even immediately after his conviction and during the pendency of this appeal he has remained on bail all throughout. He has been awarded sentence of three years by the trial Court. However, looking to the fact that 13 long years have passed since the date of offence and during this time he has suffered mental agony, anxiety and also financial expenditure, leniency is required to be shown in the matter of sentence and it is required to be reduced to some extent. In our opinion, looking to the gravity of the offence and considering the above circumstances, the ends of justice will meet if the sentence of three years imprisonment is reduced to sentence of imprisonment for 18 months for the said offence. The sentence of fine imposed by the trial Court will remain the same. The bail bonds of appellant no. 1 shall stand cancelled and he will have to surrender to the custody forthwith to serve out the remaining sentence.

So far appellant no. 2 is concerned, his appeal is abated.

So far appellant no. 3 is concerned, his conviction recorded by the trial Court for the offence u/S. 302 of the IPC is altered to one u/S. 304 Part-II.

It appears from the record that at pre-trial stage appellant no. 3 had remained in custody for some time and thereafter he was also released on bail. However, after the date of conviction and sentence i.e. 10/6/1994, he has remained in prison since his request for bail was turned down by this Court. Thus, he has remained in prison for over 8 years and 6 months. In view thereof, we deem it proper to impose sentence of imprisonment for the period already undergone by him, instead of RI for life, while maintaining the sentence of fine. In view thereof, the appellant no. 3 is now required to be set at liberty forthwith, subject to payment of fine and if not required for any other purpose. Thus, this appeal is partly allowed.

[M. H. KADRI, J.]

[AKSHAY H. MEHTA, J.]

* Pansala.